INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 377

NATHAN GOLDSMITH AND THE MANHATTAN COFFEE AND SUGAR COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 501–505) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 19, 1943 (R. 506). The petition for a writ of certiorari was filed September 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in registering with the Office of Price Administration under the sugar rationing program as a wholesaler and industrial user of sugar, Manhattan had 517,000 pounds of sugar which it was required to report as part of its present inventory of sugar, and, if so, whether Goldsmith, who filed the registration forms for the corporation, acted wilfully and knowingly in failing to do so.

2. Whether in charging the jury the court improperly commented on the evidence, erred in its instruction on the ownership of the sugar, and erred in refusing petitioners' requested instructions to the jury.

STATUTE OND REGULATIONS INVOLVED

Section 35A of the Criminal Code (18 U. S. C. 80) and pertinent provisions of Ration Order No. 3, issued by the Office of Price Administration, are set forth in the Appendix, *infra,* pp. 17–22.

STATEMENT

Petitioners were indicted on November 2, 1942, in the District Court for the Eastern District of New York in two counts, each charging a violation of Section 35A of the Criminal Code (R. 6–8). Count I charged that for the purpose of inducing

the Office of Price Administration to issue sugar purchase certificates for 379,333 pounds of sugar, petitioners on April 28, 1942 falsely represented in an application for the registration of retailers and wholesalers that the corporate petitioner's "present inventory" of sugar was 4,000 pounds, whereas, as petitioners knew, the actual inventory was approximately 517,000 pounds (R. 6–7). Count II similarly charged that in a registration of industrial users of sugar on April 28, 1942, petitioners falsely represented that the corporation's "present inventory" of sugar was "00" pounds, whereas, as petitioners knew, the actual inventory was approximately 517,000 pounds (R. 7–8).

At the trial, petitioners moved for a directed verdict at the close of the Government's case (R. 210) and at the close of the trial (R. 326) on the ground that the Government had not established the guilt of petitioners beyond a reasonable doubt. These motions were denied. The jury found petitioners guilty as charged on both counts of the indictment (R. 339). Goldsmith was sentenced to imprisonment for two years on each count, the sentences to run concurrently, and the corporation was fined $2,500 (R. 2). Upon appeal to the court below both convictions were affirmed (R. 506).

The pertinent evidence adduced at the trial may be summarized as follows:

The corporate petitioner is engaged in the wholesale distribution of sugar and coffee and

restaurant and baker's supplies; it manufactures a syrup, cordials, and extracts and it jobs groceries (R. 239). Goldsmith is president and treasurer of the corporation and he has been "running the business * * * exclusively since 1920" (R. 240).

On April 28, 1942, the day designated by the Office of Price Administration for the registration of persons engaged in the sugar trade (R. 200), Goldsmith, on behalf of the corporation, applied to the Office of Price Administration on O. P. A. Form R. 305 for registration as a wholesale distributor of sugar, stating that the corporation's "present" inventory of sugar was 4,000 pounds, and requesting the issuance of sugar purchase certificates to the corporation for 379,333 pounds of sugar (Gov't Ex. 3, R. 359–360). He also applied on O. P. A. Form R. 310 for registration as an industrial user of sugar, stating that the corporation's "present inventory" was "00 lbs." (Gov't Ex. 4A, R. 365–367). Both applications were signed by Goldsmith acting for the corporation (R. 192). On the basis of the representations made in the applications, the Office of Price Administration issued to the corporation sugar-purchase certificates, authorizing the acquisition by the corporation of 379,333 pounds of sugar for wholesale distribution (Gov't Ex. 30, R. 471) and 126,000 pounds for industrial use (Gov't Ex. 29, R. 470).

The charges in this case arise from Manhattan's part in four sugar transactions in April 1942. The relevant evidence with respect to the first transaction shows that on April 10, 1942, Goldsmith, on behalf of Manhattan, signed a contract for the purchase of 900 bags of offshore refined sugar (Gov't Ex. 1B, R. 344–347). The contract fixed the sale price at $5.40 per hundred-pound bag, "less 2% C. O. D. certified check—$500 paid on account" (R. 344). Among the "conditions of purchase" enumerated in the contract was the provision that delivery would be made as soon as possible after receipt of instructions from the buyer and that delivery was complete on receipt of the goods by the carrier (R. 344–345). Manhattan was billed on the same day for the purchase price of the sugar (Gov't Ex. 1A, R. 343). On April 13 Goldsmith arranged with the Modern Industrial Bank for a loan of $3,600 secured by a warehouse receipt for the sugar (R. 37, Gov't Exs. 11, 11A, R. 381–389). On or about April 15, 1942, the sugar was delivered to a warehouse with which Goldsmith had arranged for storage (R. 67–70). The vice president of the bank testified that on that day Goldsmith delivered the warehouse receipt for the sugar to the bank, and, "We loaned the Manhattan Coffee and Sugar Co. $3,600" (R. 37).[1] The

[1] Although the loan was for $3,600, the bank check was for $4,762.80, the full purchase price for the sugar (Gov't Ex.

warehouse receipt was issued in the name of the bank (Deft. Ex. A, R. 475). The terms of the loan called for the repayment of it in four monthly installments of $900 each, with the proviso that as each payment was made a proportionate amount of sugar would be released from the security arrangement (R. 37). The payments were made beginning on May 9 and ending on August 28, and on each day that the payment was received, the bank issued an order to the warehouse releasing 225 bags of sugar (R. 38; Gov't Ex. 16, R. 437–438). Manhattan paid the storage charges on the sugar (R. 44) and the sugar was insured by the bank with loss, if any, payable to the bank (R. 42). The other three transactions in April were substantially the same in all pertinent respects. As a result of them, 422,000 pounds of sugar were placed in warehouses prior to April 28, 1942, under the same arrangements as those above described.[2] (See R. 44–54, Gov't Ex. 13, R. 403, Govt Ex. 13A, R. 405, Gov't Ex. 13B, R. 406, Gov't Ex. 13–C, R. 407, Gov't Ex. 13G, R. 410, Gov't Ex. 13–H, R. 411, Def. Ex. B, R. 477; R. 57–69, Gov't Ex. 14, R. 413, Gov't

11B, R. 391). Manhattan furnished the additional $1,162.80 (R. 39). It would appear from Paper No. 1 of Government Exhibit 16 (R. 433) that petitioners also surrendered the original bill of lading for the sugar, duly endorsed, to the bank.

[2] The sugar purchased under the contracts totaled 427,000 pounds, but 5,000 pounds was apparently lost in transit (R. 64, 256).

Ex. 14–A, R. 414–418, Gov't Ex. 14–B, R. 419, Gov't Ex. 15, R. 421, Gov't Ex. 15–A, R. 422–426, Gov't Ex. 15–B, R. 427–429, Gov't Ex. 15–C, R. 430–431, Gov't Ex. 20, R. 457, Gov't Ex. 22, R. 459, Gov't Ex. 23, R. 460–463, Gov't Ex. 24, R. 464, R. 246, 256, 310.)

Goldsmith did not report any of the 512,000 pounds of sugar as constituting a part of his "present inventory" in the registrations with the Office of Price Administration (see Gov't Exs. 3, 4, and 4–A, R. 359–367). In explanation of his failure to reveal this sugar, Goldsmith testified that on and after April 6, 1942, he was obligated to deliver 225,000 pounds of sugar to the Colonial Candy Company and that in the middle of April he decided to use approximately 300,000 pounds of sugar for manufacturing an icing which Manhattan sold commercially (R. 261–264, 271–274, 300). The petitioners' evidence concerning the alleged sale to the Colonial Candy Company is as follows:

In March 1942 petitioners entered into negotiations with an unidentified person allegedly representing the Colonial Candy Company for the sale to Colonial of 225,000 pounds of sugar and on April 6, 1942, that person paid petitioners $1,500 in cash to be applied on the purchase price of the sugar (R. 131, 262–263, 303–307). Goldsmith testified that he regarded the transaction as a "final sale * * * on the date we received the deposit" (R. 282), and that he segregated 225,000

555743—43——2

pounds for delivery to Colonial (R. 284). None of the sugar was delivered prior to April 28 (R. 265) and of the sugar delivered thereafter, some was sugar other than that previously segregated for delivery to Colonial (R. 284, 302–303).

The government witness, Bernikow, who operates the Colonial Candy Company, testified that he had never purchased sugar from petitioners or had any other dealings with them (R. 54–55). The petitioner corporation's books show no record of the receipt of $1,500 from the Colonial Candy Company or any person representing Colonial (R. 128–129); Goldsmith did not give a receipt for the money to the person from whom he claims to have received it (R. 263–264). On July 2, 1942, and July 16, 1942, representatives of the Office of Price Administration and the Alcohol Tax Unit of the Treasury Department examined the corporate books, but they were unable to find any entries showing a sale to Colonial of 225,000 pounds of sugar (R. 121). In the course of examining the books again on July 20, 1942, they found several bills dated from May 28 to July 16 and showing sugar sales to Colonial in the back of the July salesbook (R. 123). When questioned by the Special Agent of the Alcohol Tax Unit as to why bills from May and June were grouped with July bills in the July book, Goldsmith refused to answer (R. 124).

The evidence with reference to the alleged segregation of 300,000 pounds of sugar for making

icing shows that it is the practice of Manhattan to furnish sugar to a manufacturer of the icing who sells the finished product to Manhattan (R. 194, 272). There was no physical segregation of the 300,000 pounds of sugar from the other sugar in the warehouses which was held for sale (R. 194), and Goldsmith testified that the segregation was "strictly a mental operation" (R. 274). From July 22, 1942, to October 20, 1942, Manhattan did use approximately 300,000 pounds of sugar for manufacturing icing, but not all of it was the sugar which he had previously mentally segregated (R. 274–275, 283–284).

Goldsmith testified that at various times prior to April 28, 1942, he telephoned the War Production Board with reference to sugar rationing (R. 250). After he procured the Office of Price Administration registration forms he consulted with various members of the sugar trade (R. 245, 252) and with his brother, an attorney (R. 253), concerning the information called for by the forms. As a result of these inquiries it was his understanding that "inventory means actual sugar which I can sell to a grocer, to B and C, which my driver brings back a certificate equivalent to the amount of sugar which he delivered" (R. 254).

ARGUMENT

1. On April 21, 1942, the Price Administrator

issued Ration Order No. 3 (7 F. R. 2966) [3] regulating the transfer of sugar on and after April 28, 1942. Section 1407.102 of that order prohibited the delivery of sugar to any retailer or wholesaler except in exchange for ration certificates or stamps, and further provided that no wholesaler should make or accept a transfer of sugar until he had been registered with the Office of Price Administration. The order provided for registration on April 28 and 29, 1942 (Sec. 1407.103), and for the determination of the registrant's working inventory of sugar to be known as the "allowable inventory" (Sec. 1407.105). It further provided that if the registrant's present inventory was less than its allowable inventory, a sugar purchase certificate should be issued in the amount of the difference (Sec. 1407.106). Section 1407.104 provided—

> *Present inventory.*—The present inventory of a registering unit is the aggregate of all sugar in the possession of, or intended to be used by, the registering unit, to which, at the time of registration, the owner of the registering unit has title or holds documents of title, or which was in transit or

[3] Ration Order No. 3 was issued by the Price Administrator pursuant to the Act of January 30, 1942, c. 26, 56 Stat. 23 (50 U. S. C. App., Supp. II, Sec. 901 *et seq.*), W. P. B. Directive No. 1, 7 F. R. 562, Supplementary Directive No. 1E, 7 F. R. 2965. There have been a substantial number of amendments to the order since it was issued, but none are herein pertinent.

> stored for delivery to the registering unit and out of the possession of the vendor of the registering unit prior to April 28, 1942. The owner shall be deemed to have title to sugar regardless of the fact that it may have been mortgaged, pledged, or otherwise used as security in a credit transaction, or that its use may have been prohibited by any order of the War Production Board.
> * * *

The order contained similar provisions with respect to industrial users of sugar (Secs. 1407.81–1407.94).

Thus it is plain that when Goldsmith applied for registration as a wholesaler and industrial user of sugar, he was required to report as the corporation's "Present Inventory" not only the sugar which the corporation owned outright, but also the sugar which it owned subject to security interests of other persons. An analysis of the four April transactions involving 517,000 pounds of sugar clearly reveals that sugar to be in the latter category. Whether the financing transaction between Manhattan and the banks be treated as a pledge of the warehouse receipts as collateral security for the loans (See Restatement, Security, Secs. 2 and 8; 2 Williston, *Sales,* 2nd ed., sec. 440) or as a hybrid security transaction peculiar to the sugar trade, it seems clear that petitioners had a substantial proprietary interest in the sugar, and that, at best, the banks had security title only.

Cf. *In re Richheimer,* 221 Fed. 16, 22–23 (C. C. A. 7); 1 Williston, *Sales,* 2nd ed., secs. 286–286a.

Petitioners' contention (Pet. 3, 10) that the banks owned the sugar outright and that petitioners had no more than an option to purchase the sugar is refuted by the plain facts of this case. In addition, the cases relied upon by petitioners in support of their contention (Pet. 12) are clearly distinguishable on their facts from the instant case. Thus, for example, in *Dow* v. *National Exchange Bank of Milwaukee,* 91 U. S. 618, McLaren & Co. purchased wheat on orders from Smith. McLaren & Co. paid for the wheat, took the bills of lading describing McLaren & Co. as the shippers and provided for delivery to Smith upon his acceptance of drafts drawn upon him (91 U. S., at 618–619). In rejecting the contention that Smith became the owner when McLaren purchased the wheat, this Court said (91 U. S., at 629):

> It is not open to question that McLaren & Co., having purchased it at Milwaukee and paid for it with their own money, became its owners. Though they had received orders from Smith and Co. to buy wheat for them, and to ship it, they had not been supplied with funds for the purpose, nor had they assumed to contract with those from whom they purchased on behalf of their correspondents.

Compare the undisputed facts in the instant case (*supra,* pp. 5–7) showing that Manhattan purchased the sugar, that the sellers throughout the transaction dealt with Manhattan, that part of the purchase price was paid with Manhattan's funds, and that the remainder was paid with funds loaned by Manhattan on the security of its collateral notes and the warehouse receipts for the sugar.[4]

Under these circumstances it seems clear that on April 28, 1942, the date on which petitioners registered with the Office of Price Administration, Manhattan's "Present Inventory" of sugar included 512,000 pounds in which the banks had a security interest, and that the sugar should have been revealed in the registration forms.

2. As a result of petitioners' failure to report the 512,000 pounds of sugar they obtained sugar-purchase certificates from the Office of Price Administration in excess of their allowable in-

[4] Petitioners cite numerous other cases (Pet. 10–12) dealing with the meaning of the word "own" in varying factual contexts. Even in the absence of the specific language of Section 1407.104 of the Ration Order defining "present inventory" (*supra*, pp. 10–11), which is controlling here, these cases would not be persuasive. It is well recognized that the precise meaning of "own" depends upon the subject matter and the circumstances surrounding the subject matter and the parties. *Prudential Insurance Company of America* v. *Kraschel*, 222 Iowa 128, 266 N. W. 550, 552; *Peterson* v. *Johnson*, 132 Wis. 280, 111 N. W. 659, 660; *Judd* v. *Landin*, 211 Minn. 465, 1 N. W. (2d) 861, 865; *Burns* v. *Winchell*, 305 Mass. 276, 25 N. E. (2d) 752, 755; cf. *City Bank Farmers Trust Co.* v. *Hoey*, 125 F. (2d) 577, 579 (C. C. A. 2).

ventory for wholesale purposes (Sec. 1407.105) and their allotment for industrial purposes (Sec. 1407.86) as provided in the Ration Order. Whether petitioners wilfully and knowingly made the false statements was primarily a question of fact for the jury, depending on whether it believed Goldsmith's testimony. As the court below emphasized (R. 504–505):

> The testimony given by Goldsmith to support his claim that he had sold 225,000 pounds of sugar to another company before April 28th, and consequently acted on his belief that he need not include it for that reason innocently failed to do so, need not, of course, have been believed by the jury and evidently was not. The deduction he made on the basis of a mere mental segregation was of sugar he was likewise shown to have known should have been reported. The so-called segregation rested, of course, upon too flimsy evidence to have been found as a fact by any intelligent juror. * * *

If, as is apparent, the jury disbelieved Goldsmith, the only reasonable inference which it could derive from the evidence was that he intentionally refrained from revealing the 512,000 pounds of sugar for the purpose of obtaining from the Office of Price Administration sugar-purchase certificates to which the corporation was not entitled.

3. In instructing the jury the court stated:

> If the Manhattan Coffee and Sugar Company actually contracted with Olavaria and

> Hershey for the purchase of sugar and then borrowed money in order to complete the purchase or to make the purchase possible, the sugar was legally the property of the Manhattan Coffee and Sugar Company, just exactly as your house is your property, although you have a mortgage on it, although you borrow money in order to make the purchase, it is your house. (R. 337.)

While the technical legal aspects of a security transaction such as the one in this case may differ from a mortgage of real property, it is apparent that both are security transactions of a similar character. Compare the same analogy used by Williston in dealing with transactions similar in some respects with the financing arrangements used by petitioners. 1 Williston, *Sales,* 2nd ed., sec. 286. Once it is recognized that petitioners had more than an option to purchase sugar (Pet. 3, 10), it is plain that the court's resort to the mortgage analogy to make clear to the jury the legal effect of using the sugar for security purposes was free from prejudicial error.

Petitioners' other complaints with reference to the charge to the jury (Pet. 15–16) were first considered by the trial judge and rejected (R. 337–339). The court below likewise found no error in the charge (R. 505). We submit that resort to the full text of the charge (R. 328–337) refutes the contention made. As the court below concluded (R. 505), petitioners had a fair trial in which they lost on the decisive issues of fact.

CONCLUSION

The petition presents no question of importance and no conflict of decisions is involved. We therefore respectfully submit that it should be denied.

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OCTOBER 1943.